95-1097 (1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARY E. HOGAN, COLE TAYLOR BANK, AS TRUSTEE UNDER TRUST NO. 77-432 DATED DECEMBER 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Petitioners,

v.

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does due process require that the failure to effect personal service of the notice of public hearing on 18 of the 65 different property owners in a proposed Special Taxing District result in the invalidation of the taxing ordinance?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Appellate Court of Illinois.

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OPINIONS BELOW

The Order of the Circuit Court of Lake County, Illinois granting Petitioner's original Motion for Summary Judgment on the basis of the lack of personal service of the tax notice and insufficient content of the tax notice was entered March 30, 1994, is unreported and is reprinted at Page 25 of the Appendix to this Petition.

The Order of the Illinois Appellate Court, Second Judicial District, reversing the decision of the Circuit Court of Lake County, Illinois, was entered on May 2, 1995, is reported at 272 Ill.App.3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705 and is reprinted at Page 1 of the Appendix to this Petition.

The Order of the Illinois Appellate Court, Second Judicial District, denying Petitioner's Petition for Rehearing was entered on June 9, 1995, is unreported and is reprinted at Page 23 of the Appendix to this Petition.

The Order of the Illinois Supreme Court denying the Petition for Leave to Appeal was entered on October 26, 1995, is reported at 163 Ill.2d 560, 657 N.E.2d 623, 212 Ill.Dec. 422 and is printed at Page 24 of the Appendix to this Petition.

JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction pursuant to 28 USC Sec. 1257(a). The Illinois Appellate Court, Second Judicial District, reversed the Summary Judgment entered by the Circuit Court of Lake County, Illinois, in favor of Petitioners and that Order reversing was entered on May 2, 1995. The Illinois Supreme Court denied Petitioners' timely filed Petition for Leave to Appeal on October 4, 1995. The Petition for Writ of Certiorari was filed within 90 days of the denial of the Petition for Leave to Appeal in the Illinois Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

35 ILCS 235/5 (West 1992). Establishment of special service area-Ordinance-Notice-Hearing

5. Prior to or within 60 days after the adoption of the ordinance proposing the establishment of a special service area the municipality or county shall fix a time and a place for a public hearing. Notice of the hearing shall be given by publication and mailing, except that notice of a public hearing to propose the establishment of a special service area for weather modification purposes may be given by publication only. Notice by publication shall be given by publication at least once not less than 15 days prior to the hearing in a newspaper of general circulation within the municipality or county. Notice by mailing shall be given by depositing said notice int he United States mails addressed to the person or persons in whose name the general taxes for the last preceding year were paid on each lot, block, tract or parcel of land lying within the special service area. Said notice shall be mailed not less than 10 days prior to the time set for the public hearing. In the event taxes for the last preceding year were not paid, the notice shall be sent to the person last listed on the tax rolls prior to that year as the owner of said property.

STATEMENT OF THE CASE

I. The Factual Background

In December of 1990, the Village of Lake Barrington, Illinois hired John Reindl as a Special Projects Coordinator whose initial duties related to the creation of a proposed Special Service Area (SSA). The proposed SSA contemplated the installation of an underground municipal waterline and sewer system to service an area within the Village limits known as the Lake Barrington Industrial Park. The Village does not have sewer or municipal water in either its residential or its industrial areas, but is served by individual well and septic systems.

After Reindl's initial investigation, the Village held two public informational meetings, on January 22, 1992 and April 22, 1992, relative to the proposed SSA. After the two informational meetings were held, the Village elected to go forward on the project and adopted its first ordinance, on July 7, 1992, establishing a public hearing date of July 29, 1992.

The Village published Notice of the public hearing in the local newspaper, the Daily Herald, on July 13, 1992. The notice was also mailed to 47 of the 65 different property owners in whose names the general taxes for the preceding year had been paid. The Notice that was mailed to a portion of the owners of record stated that the public hearing was convened to "consider forming" the proposed SSA.

The public hearing was held on July 29, 1992. After the hearing, petitions objecting to the SSA were filed but contained an insufficient percentage of the requisite signatures of owners and electors to invalidate the ordinance. The Village then adopted the establishing ordinance for the SSA and a bond ordinance.

Petitioners hired an attorney to represent them in connection with redressing certain defects in the enabling process relative to the SSA. The Village first threatened to file, then filed suit against the Petitioners for allegedly interfering with the bond sale by hiring an attorney to represent them in seeking a judicial declaration of the invalidity of the SSA Ordinance. The Petitioners counterclaimed for a declaration of the invalidity of the SSA and for civil rights violations.

II. The Proceedings In The Courts Below

The trial court, on cross-motions for summary judgment, ultimately ruled that the subject ordinances were invalid because the written Notice did not satisfy the statutory requirement for personal service by mailing upon the individual owners and also that the Notice was insufficient in content. The trial court ruled, as a matter of law, that the SSA had not been gerrymandered. The Petitioners' civil rights claims were dismissed, but the court awarded the individual petitioners attorney's fees as a sanction for the Village's filing of the tortious interference with bond sale suit.

The Illinois Appellate Court, Second Judicial District, affirmed in part, reversed in part, and remanded, to wit:

1.) reversed the order of the trial court on the issue of the legitimacy of the SSA ordinances, finding that personal service of Notice on the individual property owners was neither mandatory or jurisdictional to conducting the SSA public hearing;

2.) found that the statutorily required contents of the written notice to the individual property owners were merely directory statutory provisions, i.e., not mandatory.

3.) ruled that the failure of the Village to disclose the identity of the property owners included within the SSA at the public hearing was not a violation of Section 9 of the Act.

4.) affirmed the trial court's finding, as a matter of law, that the SSA had not been gerrymandered.

5.) reinstated Petitioners' civil rights claims.

The Appellate Court denied Petitioners' Petition for Rehearing. The Illinois Supreme Court denied Petitioners' Petition for Leave to Appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

Section 5 of the Illinois Special Service Area Tax Act (the Act) provides that notice of the hearing regarding the establishment of a special service area shall be given by publication in a newspaper of general circulation in the county and by mailing. (35 ILCS 235/5 (West 1992).) Section 5 specifically provides as follows:

> "*Notice* by mailing *shall be given* by depositing said notice in the United States Mail *addressed to the person or persons in whose name the general taxes for the last proceeding year were paid on each lot* *** within the special service area. *** In the event taxes for the last preceding year were not paid, the notice shall be sent to the person last listed on the tax rolls prior to that year as the owner of said property."

35 ILCS 235/5 (West 1992).
(emphasis added)

The United States Supreme Court in the case of *French v. Edwards* (1872), 80 U.S. 506, 20 Law.Ed. 703, set forth the general rule governing whether the provisions of a tax statute are mandatory or directory, when it stated as follows:

> "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. **But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."**
>
> *French v. Edward*, 80 U.S. 506, 511, 20 L.Ed. 702, 703 (1872).
>
> (emphasis added)

The United States Supreme Court, relying on *French v. Edwards*, invalidated a special improvement tax in the case of *Lyon v. Alley*, 130 U.S. 177, 32 L.Ed. 899, 9 S.Ct. 480 (1889), when it stated as follows:

> "This proposition presents the question whether the failure of the commissioner to deposit with the register a statement of the taxes upon the lots, . . . and the failure of the collector to give the required notice to such persons, constituted such a nonobservance of the requirements of the statute as to render invalid . . . the tax sale . . . .
>
> In view of the specific and imperative language of these provisions, and more especially of their nature and obvious purpose, we cannot doubt that they were intended as *conditions precedent*, a strict compliance with which was necessary in order to make the tax chargeable as a lien upon the lots."
>
> *Lyon v. Alley*, 130 U.S. 177, 184, 32 L.Ed. 899, 902 (1889).

The *Lyon v. Alley* court reasoned as follows:

> "The provisions of statutes as to the form and mode of assessments, as to tax lists, and the place where the tax lists are to be deposited, are, according to the highest authority, designed for the benefit of the taxpayers and the protection of their property from sacrifice."
>
> *Lyon v. Alley*, 130 U.S. 177, 185, 32 L.Ed. 899, 902 (1889).

The foregoing cases have been followed in every federal circuit; as well, they have been followed in every state court in which the issues have been addressed, including the Illinois Supreme Court.

It is undisputed that there are only 65 *different* property owners within the proposed SSA and that 18 individuals (almost 28%), who were specifically identified by the Petitioners, were not sent the statutorily required notice by mail. The Appellate Court invalidated the SSA only as to that parcel owned by Ruth Loiacono, since she

was the only specifically named individual who, in the court's opinion, had standing in the litigation. The court disregarded the principle that the notice requirements are "*conditions precedent*" to the validity of the tax; i.e., once it has been conclusively established that the notice requirements have not been met, the entire ordinance must be declared invalid. Absent the personal notice to the specific individuals who have been singled-out for disparate taxation, it is impossible to ascertain the consciousness of those selected citizens on the issue of whether they oppose or support the proposed tax. More dangerously, the taxing process becomes rife with the insidious potentiality of deliberately denying notice of the public hearing to those citizens who may be known, in advance, to vocally oppose such a tax and relish the opportunity to make a public record of their opposition. To this day, apart from three members of the Lake Barrington Industrial Park Association who filed affidavits attesting to the failure of the Village to send them notice and their opposition to the SSA, the knowledge (or, as is more probably the case, *lack* of knowledge) of the other fourteen individuals who were denied mailed notice of the public hearing remains unascertained.

The Appellate Court made much of the notion that such ordinances are presumptively valid. Again, the court failed to comprehend the fact that the notice requirements are the fundamental due process foundation—which requirements must be complied with *first*—in order to give rise to the presumption. An undisclosed, unnoticed "public hearing" does not become permissible on the basis of a presumption that cannot exist until after the hearing is *properly held* pursuant to the strict requirements of the enabling statute.

CONCLUSION

Petitioners, Mary E. Hogan, Sam Loiacono, Ruth Loiacono and the Lake Barrington Industrial Park Association, respectfully submit that this Court should grant this Petition and direct a Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District, to review its Order reversing the Circuit Court of Lake County and holding the Special Service Area tax valid.

Respectfully submitted,

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